STATE OF MICHIGAN

COURT OF APPEALS

STACEY SHEIKO,

Plaintiff-Appellant,

v

UNDERGROUND RAILROAD and VALERIE HOFFMAN,

Defendants-Appellees.

UNPUBLISHED
December 16, 2008

No. 277766
Saginaw Circuit Court
LC No. 06-058921-CL

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

CAVANAGH, J. (*dissenting*).

I respectfully dissent. I would reverse the order granting defendants' motion for summary disposition and remand for further proceedings.

In this WPA claim brought under MCL 15.362, the primary dispute is whether plaintiff established a genuine issue of material fact that she reported suspected illegal activity to a public body, i.e., her engagement in protected activity. See *West v Gen Motors Corp*, 469 Mich 177, 184-185; 665 NW2d 468 (2003); *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). Defendants argued that plaintiff's self-serving deposition testimony to that effect was insufficient. The trial court agreed, as does the majority opinion of this Court. I disagree and conclude that plaintiff met her burden.

Plaintiff testified in her deposition that on September 28, 2005, she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General's office via submission of an online complaint form. Plaintiff further testified that a screen "popped up" after she "hit the submission button" which indicated that the complaint "had gone through." Under the WPA, a plaintiff engages in protected activity if she has reported a suspected illegal activity to a public body. The WPA does not require that the public body receive, act upon, or acknowledge receipt of the report. Here, through sworn testimony, plaintiff indicated that she made such a report. The trial court concluded that plaintiff's testimony was incredible because it was not supported by "objective proof." The majority of this Court appears to agree, and concludes that plaintiff's claim that she filed the complaint "lacks genuineness."

In reaching these conclusions, both the trial court and the majority of this Court have ignored several well-established rules that govern the review of motions brought under MCR

2.116(C)(10). First, motions brought under MCR 2.116(C)(10) test the factual support of a plaintiff's claim. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Second, the court must consider the documentary evidence submitted in the action, including deposition testimony. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Third, the court is not permitted to assess credibility or determine facts on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Fourth, all reasonable inferences from the record evidence must be resolved in favor of the nonmoving party. *Veenstra*, *supra*. And fifth, this Court is liberal in finding a genuine issue of material fact that requires a trial to resolve. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005).

In this case, plaintiff testified that she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General's office. Thus, the transcript of plaintiff's deposition testimony is the documentary evidence that provides the factual support for her claim that she engaged in protected activity. Whether plaintiff's testimony is worthy of belief—or "genuine"—was not an issue for the trial court to consider and is not an issue for this Court to determine. Again, weighing credibility is not permitted in deciding a motion for summary disposition. *Id*. If someone other than plaintiff would have testified that they saw, knew, or heard that plaintiff filed such a complaint, plaintiff's case would not have been dismissed on this ground. It is only because plaintiff filed her complaint anonymously and without initially advising anyone else of her protected behavior that her claim is unfairly suspect and vulnerable. As a consequence, plaintiff has been wrongfully denied the protection of the WPA—the purpose of which is to protect the public health and safety by encouraging employees to report illegal or suspected illegal activity of their employers—simply because she initially told no one of her efforts and she did not get a "receipt" upon filing her complaint. See *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 584; 649 NW2d 754 (2002).

Further, concluding that plaintiff did not file such a complaint—as the trial court and this Court in essence did—constitutes an impermissible finding of fact. Whether plaintiff's testimony that she filed a complaint with the Attorney General's office is worthy of belief is a matter solely for the fact-finder to determine. See *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). Thus, I would conclude that a genuine issue of material fact exists as to the issue whether plaintiff was engaged in protected activity before she was terminated from her employment.

I would also hold, contrary to the trial court's conclusion, that plaintiff presented sufficient circumstantial evidence to establish a causal relationship between the protected activity and her termination. "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a . . . retaliatory basis." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). Plaintiff testified that she told defendant Valerie Hoffman at a meeting on September 29, 2005, something to the effect that she had made a report to a governmental body about her concerns that there were illegalities in the organization. Again, plaintiff's testimony must be accepted as credible for summary disposition purposes. *Burkhardt, supra* at 646-647. Hoffman terminated plaintiff on October 19, 2005, less than three weeks later. The termination occurred even though plaintiff's

evaluation report in May 2005 referred to plaintiff's efforts as "laudable." And plaintiff presented testimony from three witnesses to her work. Plaintiff's work was characterized as "impeccable," "very thorough and effective," "beyond what was required of her," and "timely completed." Viewing these circumstances in a light most favorable to plaintiff, a reasonable fact-finder could conclude that Hoffman terminated plaintiff because plaintiff engaged in the protected activity of reporting a violation or suspected violation of the law to the Attorney General's office.

In summary, plaintiff made a prima facie showing under the WPA that (1) she was engaged in protected activity, (2) she was terminated from her employment, and (3) a causal connection exists between the protected activity and the termination. See *West*, *supra*. Thus, I would reverse the grant of summary disposition in defendants' favor, and the matter would be remanded for further proceedings.

/s/ Mark J. Cavanagh